In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-299

NED G. SAALFRANK, *Petitioner,*

vs.

PARKVIEW MEMORIAL HOSPITAL, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WARREN W. WYNEKEN
2412 Fort Wayne National Bank Bldg.
Fort Wayne, Indiana 46802
MATT KOLB
KOLB, KOLB AND KOLB
937 Spitzer Building
Toledo, Ohio 43604
Attorneys for Petitioner

Of Counsel:

IVAN E. BODENSTEINER
606 Indiana Avenue
Valparaiso, Indiana 46383

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statute and Rule of Court Involved 2

Statement of the Case 4

Reasons for Granting the Writ—

1. By Allowing Invocation Here, the Incomplete Doctrine of Ancillary Jurisdiction May Be Given a Fuller and More Proper Definition 6
2. The Restrictive Interpretation of Rule 54(b) by the Court Below Greatly Inhibits Its Usefulness As a Means of Resolving Cases With Multiple Issues and Parties 11

Conclusion 13

Appendix A. Findings of Fact, Conclusions of Law and Final Judgment of the District Court Entered February 12, 1975 ..... A1

Appendix B. Judgment of the District Court Entered February 12, 1975 ..... A7

Appendix C. Order Amending Judgment Entered by District Court February 21, 1975 ..... A8

Appendix D. Amended Judgment of District Court Entered February 21, 1975 ..... A11

Appendix E. Memorandum and Order Making Further Amendment to Judgment by District Court Entered April 18, 1975 ..... A12

Appendix F. Decision of Circuit Court of Appeals Decided and Filed April 14, 1975 ..... A21

Appendix G. Decision of Circuit Court Denying Petition for Rehearing Dated June 4, 1976 ..... A31

Authorities

CASES

Aldinger v. *Howard*, 96 S. Ct. 2413, 49 L. Ed. 2d 276 ....6, 9, 10
Basso v. *Utah Power and Light Co.*, 495 F. 2d 906 9
Borror v. *Sharon Steel Co.*, 327 F. 2d 165 8
Bradbury v. *Dennis*, 310 F. 2d 73 9
Buresch v. *American LaFrance*, 290 F. Supp. 265 9
C.C.F. Industrial Park, Inc. v. *Hastings Indust., Inc., et al.*, 392 F. Supp. 1259 9
F. C. Stiles Const. Co. v. *Home Ins. Co.*, 431 F. 2d 917 9
Freeman v. *Howe*, 24 How. 540 10
Fulton Bank v. *Hozier*, 267 U.S. 276 10
Gravitt v. *Southwestern Bell Telephone Co.*, 396 F. Supp. 948 9
Hatridge v. *Aetna Cas. & Sur. Co.*, 415 F. 2d 809 9
Hipp v. *United States*, 313 F. Supp. 1152 8
Hurn v. *Oursler*, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 .....10, 11
Hymer v. *Chai, et al.*, 407 F. 2d 136 9
Kenrose Mfg. Co. v. *Fred Whitaker Company*, 512 F. 2d 890 8
Moore v. *N.Y. Cotton Exchange*, 270 U.S. 593 10
Myer v. *Lyford*, 2 F.R.D. 507 9
Olivieri v. *Adams, et al.*, 280 F. Supp. 428 8
Seyler v. *Steuben Motors, Inc., et al.*, 462 F. 2d 181 8-9
Sklar v. *Hayes*, 1 F.R.D. 594 9
Stewart v. *Dunham*, 115 U.S. 61 10
Stone v. *Stone*, 405 F. 2d 94 9
Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356 10
Wittersheim v. *General Transport Svcs., Inc.*, 378 F. Supp. 762 9

United Mine Workers of America v. *Gibbs*, 383 U.S. 715, 16 L. Ed. 2d 218 .....7, 10

FEDERAL STATUTES

28 U.S.C. § 1332(a) 2, 4

RULES OF COURT

Rule 54(b), Fed. Rules of Civil Procedure 3, 5, 6, 11, 12

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

NED G. SAALFRANK, *Petitioner,*

vs.

PARKVIEW MEMORIAL HOSPITAL, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Ned G. Saalfrank, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in these proceedings on April 14, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (p. A21, infra) is reported at 533 F. 2d 325. The opinion of the District Court for the Northern District of Ohio, Western Division (p. A1, infra) is reported at 390 F.Supp. 45.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 14, 1976. A timely petition for rehearing en banc was denied on June 4, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a District Court may invoke ancillary jurisdiction over a third-party claim against a non-diverse party when the finder of fact must determine the share of contribution to an injury and the aggravation of that injury caused by the non-diverse party and others who are diverse, and when the finder of fact must further apportion damages arising from the combined acts of said parties.

2. Whether a District Court may, under Rule 54(b) Federal Rules of Civil Procedure, after trial but before judgment, revise a prior order which dismissed one of the parties as a direct defendant vis-a-vis the plaintiff, and enter judgment in favor of plaintiff against that defendant, where all issues regarding the liability of that defendant to the plaintiff were tried in connection with various third-party claims against that defendant.

STATUTE AND RULE OF COURT INVOLVED

United States Code, Title 28:

§ 1332(a)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds

the sum or value of $10,000, exclusive of interest and costs, and is between

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

Federal Rules of Civil Procedure:

54(b)

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STATEMENT OF THE CASE

This case started with the filing of a suit by Ned G. Saalfrank of Indiana against Melva M. O'Daniel of Ohio in the United States District Court for the Northern District of Ohio, Western Division, on February 25, 1971, asserting jurisdiction on diversity pursuant to 28 U.S.C. 1332(a). Saalfrank had been injured in an automobile collision in Ohio on May 25, 1969 and after being treated in an Ohio hospital was transported that day to Fort Wayne, Indiana and admitted at Parkview Memorial Hospital. Four days later he fell from his bed and thereafter claimed substantial aggravation of his initial injury resulting in paraplegia.

Defendant O'Daniel immediately filed a third-party suit against the Ford Motor Company, a resident of Michigan, and in early 1972 filed a third-party suit against Parkview Hospital, an Indiana resident, and also against Don Cramer Ford Sales, Inc., an Ohio resident. Shortly thereafter Saalfrank was granted leave to amend his complaint and assert a cross-claim against Parkview. On the basis of the allegations in the O'Daniel third-party suits, Saalfrank filed third-party claims against Ford and Cramer. Thereafter, Ford and Cramer filed third-party actions against Parkview seeking indemnification for any judgment as might be assessed against them.

After Saalfrank had sued Parkview, the hospital moved to dismiss on the ground of no diversity. This motion was granted and the cause proceeded to trial to the court commencing May 28, 1974.

Saalfrank had alleged his initial injury as a fractured vertebra and the aggravation to this same spinal injury as causing the substantial loss of use of his lower extremities. Although his direct claim against Parkview had been

dismissed, Ford, Cramer, and the insurer of O'Daniel (it having been substituted as the real party in interest) pressed the claims of Saalfrank's injury aggravation against Parkview to offset any damages as might be assessed against themselves.

In its defense, Parkview called as its own witnesses an orthopedic surgeon, a radiologist, and two nurses and cross-examined Saalfrank, his hospital roommate, his mother, a visitor, an orthotic specialist, and two orthopedic surgeons.

Before entry of the judgment, Saalfrank moved the court under Rule 54(b) for vacation of the interlocutory order dismissing his complaint against Parkview. This motion was granted, and a direct judgment against Parkview was thereafter entered.

Prior to O'Daniel's initial complaint against Parkview, Saalfrank, O'Daniel, and her insurer had entered into an agreement whereby the policy limits of O'Daniel's coverage were paid to Saalfrank who agreed not to levy execution against O'Daniel or her insurer for any judgment as might be received by him. Following this, Saalfrank's counsel urged O'Daniel to assert a direct claim against Parkview for indemnification and to aid Saalfrank in making a basis for a direct claim against the hospital.

After the federal suit had been first filed and four days before the running of the Indiana statute of limitations, Saalfrank, cognizant of the jurisdictional uncertainty of his federal proceedings, filed a complaint against Parkview in the Indiana state courts. Parkview pressed this case to trial which resulted in a hung jury.

In reversing the District Court, the Sixth Circuit, noting that "the Supreme Court has not spoken on this important question . . .", found an abuse of discretion by

the district judge and further found the case "peculiarly unsuitable for the exercise of ancillary jurisdiction." Also concluding that, under Rule 54(b), that there was no authority for realigning the parties after trial and that Parkview had waived its jury right on the assumption that Saalfrank would have no claim against it, the reinstatement of Saalfrank's claim was improper.

The Sixth Circuit also discussed Saalfrank's counsel's urging of O'Daniel to file its third-party complaint against Parkview. On this issue, the District Court had found that there was "not the merest glimmer" of collusion and the circuit court did not expressly overrule.

REASONS FOR GRANTING THE WRIT

1. By Allowing Invocation Here, the Incomplete Doctrine of Ancillary Jurisdiction May Be Given a Fuller and More Proper Definition.

This case presents a question related to the issue considered in *Aldinger* v. *Howard,* 96 S. Ct. 2413, 49 L. Ed. 2d 276, decided by the Supreme Court on June 24, 1976. It deals, however, with the aspect of ancillary jurisdiction which was expressly unresolved by the *Aldinger* decision.

While *Aldinger* v. *Howard,* even though limited in scope, removed doubt in many unsettled aspects of pendent jurisdiction, the spectrum in the ancillary concept in the circuit courts of appeal remains wide indeed. In the district courts it inclines heavily toward a relaxed view. The instant petition poses an opportunity for resolution of at least a part of the unsettled issues surrounding ancillary jurisdiction. It also presents the only chance of a fair hearing for the petitioner.

The exercise of judicial power in dealing with claims which, but for a closer related jurisdiction-conferring claim

or question, could not be entertained in a Federal Court, has developed along two lines, these being pendent jurisdiction arising from a Federal claim or Federal question, and ancillary jurisdiction arising from a diversity basis. Terminology in the district and circuit courts of appeal has not been precise, but the foregoing represents a delineation respected in most of the recent decisions.

Borrowed reasoning and analogy between the two concepts has been commonplace but in many instances has done a disservice to clarity and left some litigants in dilemmas from which there was no hospitable exit.

The starting point in both situations is usually a common or closely related factual situation from which more than one claim or question has been asserted. The decision in *United Mine Workers of America* v. *Gibbs,* (1966) 383 U.S. 715, dealing with pendent jurisdiction, characterized this element when meeting the necessary test as "a common nucleus of operative fact." But it is more frequently a factor when the invocation of ancillary jurisdiction is asserted. So it is in this cause.

The divergence in holdings of the circuit and district courts still disclose some continuity, but found this often hidden in other rationales. While the courts frequently spoke of the usual considerations . . . substantiality of a federal claim or question, the prospect of additional parties as against additional claims, whether amount in controversy cases should be given special treatment, judicial economy, the avoidance of piecemeal litigation, a common nucleus of operative fact, and fairness to the litigants . . . the decisions seemed to turn more frequently on a singular and simple inquiry:

Can the aggrieved party get a fair hearing without relaxing the traditional strictures?

Thus it was in *Kenrose Manufacturing Company, Inc.* v. *Fred Whitaker Company, Inc.*, (CA 4, 1972) 512 F. 2d 890 where Judge Sobeloff affirmed the denial of pendent jurisdiction stating pragmatically,

> "Demonstrably, no prejudice resulted to any party from the order of dismissal."

Thus it was in *Borror* v. *Sharon Steel Company*, (CA 3, 1964) 327 F. 2d 165 where the court allowed the parents of a deceased child to pend their claim to that of a foreign administrator asserting a wrongful death claim of the estate; while in *Olivieri* v. *Adams, et al.*, (E.D. Pa., 1968) 280 F. Supp. 428, the court denied the assertion of a pendent claim of parents to the claim of a foreign guardian, noting recourse to,

> ". . . a result which is already available as a matter of right, in the state courts."

Thus it was in *Hipp* v. *United States*, (E.D. N.Y., 1970) 313 F. Supp. 1152, where the Court granted a motion allowing a cross-claim against a non-diverse citizen, observing,

> "If the cases were tried separately, each defendant would seek to cast the blame on the other and it would be possible for the plaintiff to recover nothing."

But the advancing of other reasons for the invocation or denial of pendent or ancillary jurisdiction often left contending parties endeavoring to fit themselves mechanically into what were ill-suited theories to advocate or oppose the assertion of claims or issues insufficient in themselves for jurisdiction.

The conflict in the circuit courts of appeal finds the Third, Fourth, Sixth, and Tenth Circuits generally restrictive in the cases of *Seyler* v. *Steuben Motors, Inc., et al.*, (CA 3, 1972) 462 F. 2d 181; *Stone* v. *Stone*, (CA 4, 1968) 405 F. 2d 94; *F. C. Stiles Const. Company* v. *Home Insurance Company*, (CA 6, 1970); 431 F. 2d 917; *Basso* v. *Utah Power and Light Co.*, (CA 10, 1974) 495 F. 2d 906; and *Bradbury* v. *Dennis*, (CA 10, 1962) 310 F. 2d 73, certiorari denied (1963) 372 U.S. 928, 9 L. Ed. 2d 733.

Support for a more relaxed treatment of the question is found in the Eighth and Ninth Circuits in *Hatridge* v. *Aetna Cas. & Sur. Company*, (CA 8, 1969) 415 F. 2d 809 and *Hymer* v. *Chai*, (CA 9, 1969) 407 F. 2d 136.

And as a further indication of the obscurity of concepts, in all of the above cases except *Bradbury, Basso,* and *Seyler* the issue is entertained as *pendent jurisdiction* when under the current definition it was in fact a question of *ancillary jurisdiction.*

The district court's inclination toward a more relaxed view is demonstrated in a large number of decisions including *Sklar* v. *Hayes*, (E.D. Pa., 1941) 1 F.R.D. 594; *Myer* v. *Lyford*, (M.D. Pa., 1942) 2 F.R.D. 507; *Buresch* v. *American LaFrance*, (W.D. Pa., 1968) 290 F. Supp. 265; *Gravitt* v. *Southwestern Bell Telephone Company*, (W.D. Tex., 1975) 396 F. Supp. 948; *Wittersheim* v. *General Transport Svcs., Inc.*, (E.D. Va., 1974) 378 F. Supp. 762; *C.C.F. Industrial Park, Inc.* v. *Hastings Indust., Inc., et al.*, (E.D. Pa., 1975) 392 F. Supp. 1259. Of these, all but *Gravitt*, supra, are now in conflict with the controlling decisions of their districts.

The unsettled character of ancillary jurisdiction is clear.

In *Aldinger*, drawing from Judge Peckham's words in the Ninth Circuit decision, 513 F. 2d 1257, 1261, the Supreme Court stated,

". . . Diversity cases generally present more attractive opportunities for exercise of pendent party jurisdiction, since all claims therein by definition arise from state law. . ."

The instant cause poses an issue compelling resolution in holding up an uncommon but obviously not unique factual issue. A serious injury caused by a diverse party and aggravated by a non-diverse party with the share of contribution to the resultant trauma and apportionment of damages either to be resolved in the Federal Court as a proper exercise of ancillary jurisdiction or to be arbitrarily halved and decided in separate forums.

Included in the *Aldinger* decision, the Court made a survey of cases treating the collateral question of ancillary jurisdiction with respect to the impleading of parties without independent basis of Federal jurisdictions: *Freeman* v. *Howe*, (1860) 24 How. 540; *Stewart* v. *Dunham*, (1885) 115 U.S. 61; *Supreme Tribe of Ben Hur* v. *Cauble*, (1921) 255 U.S. 356; and *Fulton Bank* v. *Hozier*, (1925) 267 U.S. 276. Although these cases dealt principally with interests in property, the Court concluded that they should be adjudicated in a single court and by the "decisional bridge" of *Moore* v. *N. Y. Cotton Exchange*, (1926) 270 U.S. 593 advanced the doctrine in *Hurn* v. *Oursler*, (1933) 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 to apply to pendent jurisdiction.

Petitioner suggests that a much shorter bridge is needed to resolve and clarify the ill-defined aspects of ancillary jurisdiction as are presented here.

In *Gibbs*, this Court quoted from *Hurn*, noting that,

". . . The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time."

Although *Hurn* was a *pendent* case, the principle seems at least generally to be applicable to *ancillary* cases. And it can in no way be declared an extension of jurisdiction if the corollary be adopted in a proper factual setting, *that the defendant be required to defend his whole case at one time.*

When the body of operative fact is of such a nature that any process of dissection must bear on the culpability of more than one defendant, such process must be confined to a single forum. This, petitioner urges, should be declared as a proper exercise of ancillary jurisdiction.

2. The Restrictive Interpretation of Rule 54(b) by the Court Below Greatly Inhibits Its Usefulness As a Means of Resolving Cases With Multiple Issues and Parties

The decision of the Sixth Circuit severely limited the utility and purpose of Rule 54(b), Federal Rules of Civil Procedure, when it held that the trial court could not, under the circumstances, revise its prior order dismissing plaintiff Saalfrank's third-party complaint against Parkview Memorial Hospital, Inc.

In a case involving multiple parties or issues, the rule provides that "at any time before the entry of (final) judgment" the court may revise its prior order.

In the trial of this cause the court heard extensive testimony on the third-party complaints of Melva M. O'Daniel, the Ford Motor Company and Don Cramer Ford Sales, Inc. on the issues of Parkview's negligence and the aggravation of plaintiff's injuries. Parkview vigorously defended on these points. The court concluded as a fact that Parkview, through its negligence, did aggravate Saalfrank's injuries. It then revised its prior order under the authority of Rule 54(b), reinstated Saalfrank's direct

claim against Parkview and rendered judgment in favor of plaintiff, and against Parkview.

Thus, the situation was not one where a revision of its order was necessary prior to trial in order to properly litigate all of the issues, but rather the revision was necessary after trial in order to frame a proper judgment upon the facts as found by the court.

Other than this ruling by the Sixth Circuit, no decision has been found which indicates whether or not a judge may reinstate a claim by one of the parties after the evidence is in on all issues. Under the clear language of the rule, it would appear that the court may do so, with the general caveat that its action must not prejudice a party.

Here, the trial court found that there was no prejudice and this finding is supported by the fact that the issue was fully tried under the remaining complaints. Further, even though Parkview waived a jury trial, it did so with knowledge that the initial dismissal of the one claim against it by Saalfrank was a provisional order.

The Circuit Court did not find that there was prejudice against Parkview but said:

> "From the record it would be impossible to conclude that Parkview suffered no prejudice from the reversal of the District Court's previous rulings."

This language appears to put the burden upon the prevailing party to show that there was no prejudice rather than upon the objecting party to show that there was prejudice.

This narrow interpretation of Rule 54(b), if permitted to stand, will limit its usefulness as a device to resolve multiple-issue and multiple-party cases.

CONCLUSION

Petitioner believes that it is a proper exercise of ancillary jurisdiction to include a claim against a non-diverse party when that claim and a claim against a diverse party arise from an evidentiary fact which cannot be determined without bearing on the culpability of both such parties. This should be declared to be the law as only then will it afford the opportunity for a fair hearing.

Respectfully submitted,

WARREN W. WYNEKEN
2412 Fort Wayne National Bank Bldg.
Fort Wayne, Indiana 46802
MATT KOLB
KOLB, KOLB AND KOLB
937 Spitzer Building
Toledo, Ohio 43604
Attorneys for Petitioner

Of Counsel:

IVAN E. BODENSTEINER
606 Indiana Avenue
Valparaiso, Indiana 46383

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C 71-60

NED G. SAALFRANK,
Plaintiff,

-vs-

MELVA M. O'DANIEL,
Defendant and Third-Party Plaintiff,

-vs-

FORD MOTOR COMPANY, PARKVIEW
MEMORIAL HOSPITAL, INC.,
DON KREMER FORD, INC.,
Third-Party Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

(Filed February 12, 1975)

WALINSKI, J:

1) Plaintiff Ned G. Saalfrank, at the time of this incident and the filing of this action, was a citizen and resident of the State of Indiana; Defendant Melva M. O'Daniel was a citizen of Ohio; Third-Party Defendant Ford Motor Company (hereinafter Ford) was a resident of the State of Michigan; Third-Party Defendant Parkview Memorial Hospital, Inc. (hereinafter Parkview) is a resident of the State of Indiana; and Third-Party Defendant

Don Kremer Ford, Inc. (hereinafter Kremer) was a resident of the State of Ohio. The Nationwide Mutual Insurance Company was ordered made a third-party plaintiff because of a negotiated release/loan agreement between Defendant O'Daniel and plaintiff.

2. The amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

3) On May 25, 1969, plaintiff was a passenger in the right front seat of his own automobile being operated by one Patricia Creighton in an easterly direction on U.S. Highway 24 By-Pass in the vicinity of Napoleon, Ohio.

4) At that time, Defendant O'Daniel was driving a 1968 Ford Torino in a southerly direction on Henry County Road 13-A, also known as Oakwood Avenue, Napoleon, Henry County, Ohio.

5) At that time, U.S. 24 By-Pass was the preferential highway in that there was a stop sign for southbound traffic (Defendant O'Daniel).

6) Defendant O'Daniel drove her vehicle (owned by her husband) across the westbound lanes of the By-Pass through the median strip, and after slowing but not stopping, into the path of the plaintiff's vehicle when it was 25 to 30 feet from the defendant's vehicle, and a collision occurred.

7) The vehicle of the Defendant O'Daniel did not stop or stall while crossing the eastbound lanes, nor did the Defendant O'Daniel see the approaching vehicle. Plaintiff's vehicle was proceeding lawfully and within the prima facie limits for speed.

8) Defendant O'Daniel failed to yield the right-of-way to the plaintiff's vehicle.

9) The evidence fails to show that Defendant Kremer negligently or defectively repaired the O'Daniel vehicle or contributed in any way as a proximate cause of the collision.

10) There is no evidence that Defendant Kremer breached any express or implied warranties made in the sale or repair of the O'Daniel vehicle that contributed in any way as a proximate cause of the collision.

11) There is no evidence that Ford was in any way negligent in the manufacture of, or in the design of, the O'Daniel vehicle.

12) The sole proximate cause of the collision herein was the failure to yield the right-of-way by the Defendant O'Daniel to the vehicle of the plaintiff.

13) As a result of the collision, the plaintiff was thrown about the interior of his vehicle, thereby causing multiple personal injuries consisting of a comminuted compression fracture of his second lumbar vertebra (a "blast" fracture), a broken nose, cracked teeth, bruises and abrasions.

14) Plaintiff was conveyed by ambulance to Heller Memorial Hospital in Napoleon, Ohio, where he was x-rayed, and later transferred to Parkview Memorial Hospital in Fort Wayne, Indiana.

15) For a brief time after the collision, plaintiff was able to ambulate for short periods, but was then required to lie down. Until May 29, 1969, plaintiff was able to move and control his lower extremities.

16) After emergency examination and diagnosis, plaintiff was admitted to care and transferred to a semi-private room (#337) at Parkview.

17) After admission, the treating orthopedic surgeon ordered a bed board, flat bed rest, log-roll for bed care, and Demerol, 75-100 mg. every three to four hours. Subsequently a levine tube was inserted and later a catheter. The patient was warned to remain in bed by the nurses.

18) On May 29, 1969, the levine tube and catheter were removed at about 9:00 o'clock a.m. The facts show that at the time of the subsequent fall, the plaintiff had an intravenous tube attached to his arm. The plaintiff was given 75 mg. of Demerol at 1:40 o'clock p.m. The lower bed rails were not up, and no nurse was in attendance.

19) In spite of the prior warnings about remaining in bed, and while so medicated, plaintiff attempted to get out of bed in order to avoid the painful use of a bedpan, sat up on the lower part of the bed, attempted to stand, and fell to the floor on his buttocks.

20) Prior to the fall to the floor, the plaintiff was found to be without neurological deficit, having controllable movement in his lower extremities. Subsequent thereto, even after a decompressive laminectomy, the plaintiff suffered weakness, parasthesia and paralysis of the lower extremities, has no nerve sensation in the lower extremities, and suffers now from a condition known as "drop foot" of both feet. Plaintiff's condition is permanent, and will restrict normal physical activities. He will require braces on both lower legs permanently.

21) The Court finds that, since the nature of the injury required the prevention of ambulation or excessive movement, and in view of the heavy sedation, good, proper nursing care procedures required the positioning of all four bed rails in the up position, together with constant attendance or other restraint, all as protection against ambulation or excessive movement.

22) The Court further finds that the slip and fall suffered by plaintiff was the sole proximate cause of substantial aggravation to the compression fracture suffered by plaintiff in that it resulted in a blockage of nerves in the spine and a semi-paralyzed condition of plaintiff's legs so that he has no nerve sensations below the knees, suffers from foot-drop of both legs, thereby requiring leg braces for the remainder of his life, and an inability to perform physical labor, engage in sports or other vigorous physical activity.

23) Plaintiff would not have suffered the partial paralysis or permanent disability but for the fall and aggravation of his prior injury.

24) The Court further finds that plaintiff has suffered total damages in the sum of One Hundred and Fifty Thousand Dollars ($150,000) which can be apportioned as follows:

a. Damages attributable to Defendant O'Daniel: $50,000;

b. Damages attributable to Third-Party Defendant Parkview: $100,000;

and that Defendant O'Daniel and Third-Party Defendant Parkview are jointly and severally liable.

CONCLUSIONS OF LAW

1) The Court has jurisdiction over the subject matter and all of the parties to this action.

2) Defendant O'Daniel owed a duty of care to the plaintiff which she breached by her negligent and careless operation of her motor vehicle.

3) The negligence of Defendant O'Daniel was the proximate cause of plaintiff's initial injuries, i.e., a compression fracture of the second lumbar vertebra, together with a broken nose, cracked teeth, bruises and abrasions.

4) Third-Party Defendant Parkview owed a duty of care to plaintiff which it breached by failing to provide adequate care and supervision or proper restraints to prevent ambulation or excessive movement.

5) Parkview's negligence was the sole proximate cause of the aggravation to plaintiff's injuries which resulted in a partial paralysis and permanent disability.

6) Third-Party Defendants, Ford and Kremer, were not guilty of breach of any warranty, express or implied, or of negligent repair or maintenance of Defendant O'Daniel's automobile which in any way caused or contributed to cause the motor vehicle accident in question.

FINAL JUDGMENT

Therefore, it is

ORDERED that Plaintiff Ned G. Saalfrank have judgment against Defendant Melva M. O'Daniel and Third-Party Defendant Parkview Memorial Hospital jointly and severally and recover therefrom the sum of One Hundred and Fifty Thousand Dollars ($150,000), together with the costs of this action.

IT IS FURTHER ORDERED that all of the claims against the Defendants Ford Motor Company and Don Kremer Ford Sales, Inc. be dismissed, and that all of the claims of Ford and Kremer against other parties be dismissed.

IT IS FURTHER ORDERED that the claims of Third-Party Plaintiff Nationwide Mutual Insurance Company for indemnification be dismissed.

/s/ Nicholas J. Walinski
United States District Judge

Toledo, Ohio.
February 12, 1975.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION
Civil Action File No. C 71-60

NED G. SAALFRANK,

vs.

MELVA M. O'DANIEL, et al.

JUDGMENT

(Filed February 12, 1975)

This action came on for trial before the Court, Honorable Nicholas J. Walinski, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff, Ned G. Saalfrank, have judgment against defendant Melva M. O'Daniel and third-party defendant, Parkview Memorial Hospital jointly and severally and recover therefrom the sum of One hundred and fifty thousand dollars ($150,000.00) with interest thereon at the rate of 6% (per cent) as provided by law, and his costs of action.

All claims against defendants Ford Motor Company and Don Kremer Ford Sales, Inc. are dismissed.

All claims of Ford and Kremer against other parties are dismissed.

The claims of third-party plaintiff, Nationwide Mutual Insurance Company for indemnification are dismissed.

/s/ Nicholas J. Walinski
United States District Judge

Dated at Toledo, Ohio, this 12th day of February, 1975.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION
No. C 71-60

NED G SAALFRANK,
Plaintiff,

-vs-

MELVA M. O'DANIEL,
Defendant and Third-Party Plaintiff,

-vs-

FORD MOTOR COMPANY, PARKVIEW MEMORIAL HOSPITAL, INC., DON KREMER FORD, INC.,
Third-Party Defendants.

ORDER AMENDING JUDGMENT

(Filed February 21, 1975)

This cause is before the Court upon a motion by Defendant Melva M. O'Daniel to alter or amend judgment pursuant to Rule 59(e), Federal Rules of Civil Procedure.

It appears that the final judgment entered by this Court on February 12, 1975, awarded a judgment against O'Daniel and Third-Party Defendant Parkview Memorial Hospital *jointly and severally* in the sum of $150,000. However, it is clear that the language as to joint and several liability was inadvertent, for the Court's Findings of Fact and Conclusions of Law show that the Court did not intend that Parkview be liable for O'Daniel's negligence.

It has long been the rule in Ohio that an original tortfeasor is liable for the negligence of one who treats

his victim's injuries. *Tanner* v. *Espey*, 128 Ohio St. 82 (1934). However, the provider of medical services is not liable for the original tortfeasor's negligence. *Travelers Indemnity Co.* v. *Trowbridge*, 41 Ohio St. 2d 11 (1975). Thus, O'Daniel's liability is joint and several, while Parkview's liability is only several.

In *Trowbridge, supra*, the Ohio Supreme Court noted that:

> "[t]he physician and the tortfeasor are not concurrent tortfeasors but, rather, are more in the nature of successive tortfeasors. *Id.* at ....."

In *Trowbridge*, the original tortfeasor settled with its victim and then sued the physician for indemnification. In the present case, both tortfeasors are being sued directly by the victim. Thus, O'Daniel's right to indemnification is not the primary focus of this lawsuit since both tortfeasors are being sued in one proceeding and have had a judgment rendered against them. The propriety of granting a several judgment against successive tortfeasors was established by *Ryan* v. *Mackolin*, 14 Ohio St. 2d 213 (1968).

Accordingly, it is

ORDERED that the final judgment entered by this Court on February 12, 1975, be amended to read as follows:

> "IT IS ORDERED that Plaintiff Ned G. Saalfrank have judgment against Defendant Melva M. O'Daniel and Third-Party Defendant Parkview Memoraial Hospital and recover therefrom the sum of One Hundred and Fifty Thousand Dollars ($150,000), together with interest at the rate of 6% per annum and the costs of this action; that Defendant Melva M. O'Daniel be jointly and severally liable for the full sum of One Hundred and Fifty Thousand Dollars; and that Third-Party Defendant Parkview Memorial Hospital be sev-

erally liable for the sum of One Hundred Thousand Dollars.

"IT IS FURTHER ORDERED that Third-Party Plaintiff Melva M. O'Daniel have judgment against Third-Party Defendant Parkview Memorial Hospital on her Third-Party Complaint for indemnification and recover therefrom the sum of One Hundred Thousand Dollars ($100,000).

"IT IS FURTHER ORDERED that all of the claims against the Defendants Ford Motor Company and Don Kremer Ford Sales, Inc., be dismissed, and that all of the claims of Ford and Kremer against other parties be dismissed.

"IT IS FURTHER ORDERED that Third-Party Plaintiff Nationwide Mutual Insurance Company be dismissed."

IT IS FURTHER ORDERED that Paragraph 24 of the Court's Findings of Fact be amended to read:

"24) The Court further finds that plaintiff has suffered total damages in the sum of One Hundred and Fifty Thousand Dollars ($150,000) which can be apportioned as follows:

"a. Damages attributable to Defendant O'Daniel: $50,000;

"b. Damages attributable to Third-Party Defendant Parkview: $100,000;

and that Defendant O'Daniel be jointly and severally liable and Third-Party Defendant Parkview be severally liable."

/s/ Nicholas J. Walinski
United States District Judge

Toledo, Ohio.
February 21, 1975.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION
Civil Action File No. C 71-60

Ned G. Saalfrank

vs.

Melva M. O'Daniel, Ford Motor Company,
Parkview Memorial Hospital, Inc.,
Don Kremer Ford, Inc.

AMENDED JUDGMENT

(Filed February 21, 1975)

This action came on for trial before the Court, Honorable Nicholas J. Walinski, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiff Ned G. Saalfrank have judgment against Defendant Melva M. O'Daniel and Third-Party Defendant Parkview Memorial Hospital and recover therefrom the sum of $150,000.00, together with interest at the rate of 6% per annum and the costs of this action; that defendant Melva M. O'Daniel be jointly and severally liable for the full sum of $150,000.00; and that Third-Party Defendant Parkview Memorial Hospital be severally liable for the sum of One Hundred Thousand Dollars. Third Party Plaintiff Melva M. O'Daniel have judgment against Third-Party Defendant Parkview Memorial Hospital on her Third-Party Complaint for indemnification and recover therefrom the sum of One Hundred Thousand Dollars.

All claims against defendants Ford Motor Company and Don Kremer Ford Sales, Inc. are dismissed and that all of the claims of Ford and Kremer against other parties are dismissed.

Third-Party Plaintiff Nationwide Mutual Insurance Company is dismissed.

/s/ Nicholas J. Walinski
United States District Judge

Dated at Toledo, Ohio, this 21st day of Feb., 1975.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION
No. C 71-60

NED G. SAALFRANK,
Plaintiff,

-vs-

MELVA M. O'DANIEL,
Defendant and Third-Party Plaintiff,

-vs-

FORD MOTOR COMPANY, et al.,
Third-Party Defendants.

MEMORANDUM AND ORDER

(Filed April 21, 1975)

WALINSKI, J:

This cause is before the Court on motions filed by Parkview Memorial Hospital on February 21, 1975, and March 3, 1975, to alter or amend judgment, or in the alternative, for a new trial pursuant to Rule 59, Federal

Rules of Civil Procedure. Parkview offers several grounds for its motion, many of which the Court has previously considered and decided. These contentions will be discussed *seriatem*.

1. *Lack of Jurisdiction.* The Court has previously considered this issue in its Memorandum of September 27, 1974, and the Court has concluded that the decision shall stand.

As to the "100 mile bulge" issue, it is apparent that Parkview continues to apply a standard that is no longer followed. Parkview argues that Fort Wayne is more than 100 miles from this courthouse when measured by the "ordinary, usual, and shortest route of public travel." However, one authority has pointed out, concerning Rule 4(f), that:

> "While the wording does not make clear how the distance of 100 miles is to be calculated in close cases, since the purpose of this provision is mildly to extend the territorial limits of effective service of the federal courts to facilitate determining whole controversies, the method of calculation which would lend itself to this objective should be followed. Thus such service should be allowed any place within the United States which is within a radius of 100 miles 'as the crow flies' from the federal court in which the action is pending." 2 Moore's *Federal Practice* ¶ 4.42[2] at 1293.32.

The suggested standard of air miles was found by Judge Cohen to be the applicable standard in *Deloro Smelting & Refining Co. v. Engelhard Min. & Chem. Corp.*, 313 F. Supp. 470 (D. N.J. 1970). In so doing the Court noted:

"Where, as here, the question of distance is a close one, the 'ordinary, usual and shortest' method is troublesome. In this era of mobility, what may be shortest may not necessarily be ordinary or usual. Modes of transportation, choices of routes, traffic congestion, road construction, detours, weather conditions, rerouting of air traffic are a few of the daily problems presenting too many variables and imponderables. And who is to be the final arbiter? Adoption of the 'as the crow flies' method, calculated simply by use of a map and a ruler, would avoid these myriad problems. Axiomatically, the arithemetical straight-line is the shortest distance between two points. Judicial notice may be taken of the distance between two cities." *Id.* at 474.

Accordingly, this Court applied the standard of air mileage in deciding the propriety of serving Parkview in Fort Wayne, Indiana, believing then as now that the entire controversy herein thus could be justly and inexpensively decided thereby. The Court sees no reason now to decide the matter differently.

2. *The Admission Into Evidence of Plaintiff's Hospital Record.* The Court fully considered Parkview's objection at the time this evidence was offered and sees no reason to change its ruling.

3. *The Opinion Testimony of Dr. Pollex.* Since the basis of Parkview's objection here is that plaintiff's hospital chart improperly was part of the basis for the opinion of Dr. Pollex, the Court finds no basis now to reject this evidence.

4. *Permitting Plaintiff to Assert a Claim Directly Against Third-Party Defendant Parkview.* This issue was fully considered by the Court in its Memorandum and

Order of September 27, 1974; and Parkview cites nothing now to cause the Court to change its decision.

In this connection, the Court will note that the "Agreement Not To Execute", whose validity Parkview is willing to assume, could be no bar to impleading Parkview in the first instance since Rule 14(a) speaks of the possibility of liability as well as the certainty. At that stage it would have been impossible for this Court to conclude that, because of the Agreement Not To Execute, defendant O'Daniel was completely protected from liability against plaintiff and that therefore, there could be no need for indemnification.

As to Parkview's argument that Rule 54 does not permit the Court to "realign" the parties, it is not true, first of all, that Parkview was not before the Court in an adversary capacity as respects plaintiff. Shortly after Parkview was brought into this case by defendant O'Daniel pursuant to Rule 14, the Court permitted plaintiff to amend his complaint so as to assert a claim directly against Parkview. It was only later that the Court erroneously, as it has now concluded, decided to bar plaintiff's claim. However, two facts should be noted. Firstly, while this suit was pending, plaintiff had filed an action against Parkview in the state courts of Indiana which resulted in a deadlocked jury. Thus, Parkview was careful in this action to conduct its defense so that nothing done herein would prejudice its defense in the Indiana action.

Secondly, the theory on which Parkview was impleaded herein was not based on any express contract of indemnity, and therefore, Parkview's theory of defense herein was not thus limited to, e.g., an interpretation of such a contract. Instead, O'Daniel's theory of impleader rested on the contention that Parkview had been negligent in providing medical services to plaintiff, and this negli-

gence had thereby aggravated plaintiff's injuries, thus exposing O'Daniel to liability for some injuries which she had not actively caused. Parkview's defense therefore was substantively based on a denial of such negligence. Of course, that is precisely the same substantive defense Parkview asserted against plaintiff. Indeed the evidence offered by Parkview at trial was overwhelmingly directed to showing that it was not negligent. Parkview offered a full and complete defense in this regard, including its own medical experts, etc. Indeed, it is difficult for this Court to conceive of anything that it could have offered that it did not, and Parkview itself does not now cite any such evidence.

The only tactic which it now claims it would have changed is its agreement to waive a trial by jury. However, the Court has serious doubts about this contention in view of the Court's own understanding that all parties joined in waiving a jury because of the procedural complexities involved in trying the third-party claims. Moreover, by its waiver, Parkview also incurred the benefit of avoiding the vagaries of jury verdicts in personal injury cases.

While the Court cited Rule 65(b) in its Order permitting plaintiff to amend his complaint after trial, it is clear that Rule 15 also governs the Court's power to permit such an amendment.[1]

In deciding whether to permit amendment of pleadings after trial, the Court should consider whether the adverse party will be prejudiced thereby. *Zenith Radio Corp.* v. *Hazeltine Research*, 401 U.S. 321, 330-1 (1971). Moreover, such an amendment is directed to the sound discre-

1. Rule 54(b) was thought applicable because of its admonition that any order which adjudicates fewer than all the claims of all the parties is subject to revision at any time before final judgment.

tion of the Court. *Zatina* v. *Greyhound Lines, Inc.*, 442 F.2d 238 (8th Cir. 1971). The rule contemplates that leave to amend pleadings, absent prejudice to opposing parties, shall be liberally permitted in order that cases and controversies shall be decided on their merits and not by mere procedural technicalities. *Retail Clerks International Assoc.* v. *Lion Dry Goods, Inc.*, 341 F.2d 715, 722 (6th Cir. 1965); *Cooper* v. *American Employers' Ins. Co.*, 296 F.2d 303, 306 (6th Cir. 1961). *Also Cf.* 28 U.S.C., § 1653, and *Blanchard* v. *Terry & Wright, Inc.*, 331 F.2d 467 (6th Cir. 1964).

In view of the preceding discussion, it is clear that Parkview was not prejudiced by the Order of September 27, 1974. The nature of the case was not fundamentally changed. No new parties, not previously before the Court, were added. No new, substantially different, theories of relief were introduced, And no litigation strategy which might have been different was affected thereby. Since there was no actual prejudice, the Court concluded that the Order of September 27th permitting amendment of the pleadings was proper.[2]

6. *Collusion.* The Court fully discussed this subject in its Memorandum of January 27, 1975, and adheres to the views expressed therein.

7. *Judgment Herein Is Contrary To Law.* This is partly a rehash of previous arguments, and no new discussion is needed.

There is ample evidence of negligence by Parkview, that plaintiff's injuries were aggravated thereby, and that the hospital breached an applicable standard of care.

2. On the other hand, the actual prejudice to plaintiff in denying the amendment was great. He would have been forced to try his case against Parkview all over again in a separate forum without the presence of the other defendants. These same factors weigh heavily against ordering a new trial here against Parkview alone.

8. *The Propriety of the Amendment Judgment.* The basis of Parkview's contentions here appears to be twofold: It argues that under Ohio law the right of indemnification against costs does not arise until the indemnitee has actually paid something,[3] and secondly, that O'Daniel will never have to pay anything to plaintiff because of the previously discussed Agreement Not To Execute. It is, however, not necessary to reach either contention.

Of course, whether a party has a right at all to indemnification is ordinarily governed solely by state law when the case is in federal court on diversity. 28 U.S.C., § 1652; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). However, the time of the accrual of the right may be governed by the Federal Rules of Civil Procedure. In the words of Professor James, the generally accepted view is:

> "The third-party claim need not be mature before impleader may be had. It is no objection to impleader, for example, that judgment against the original defendant, or even loss from that judgment (as by paying it) is a condition of the third party's liability. The latter may nevertheless be brought into the suit in which plaintiff seeks judgment against the original defendant, although the defendant will not be entitled to relief against the third party until all the conditions of his liability are satisfied. If they are not fulfilled by the time of judgment, the judgment itself will embody them." James, *Civil Procedure*, § 10.20, at 507.

This view is shared by the other leading authorities: 3 Moore's *Federal Procedure* ¶ 14.08, 6 Wright and Miller, *Federal Practice and Procedure: Civil*, § 1451; and by

3. *See Maryland Cas. Co.* v. *Frederick Co.*, 142 Ohio St. 605 (1944).

the cases: *Travelers Insurance Co.* v. *Busy Electric Co.*, 294 F.2d 139, 145 (5th Cir. 1961); *United Gas Corp.* v. *Guillory*, 206 F.2d 49, 52-3 (5th Cir. 1953); *Glens Falls Indemnity Co.* v. *Atlantic Bldg. Corp.*, 199 F.2d 60 (4th Cir. 1952); and *Huggins* v. *Graves*, 210 F. Supp. 98, 103-5 (E.D. Tenn.) *aff'd* 337 F.2d 486 (6th Cir. 1964). The better view appears to be that, where the accrual of the right is accelerated by Rule 14, the judgment be conditional. *See, e.g., United Gas Corp.* v. *Guillory, supra*, at 53. Accordingly, it will be necessary for the Court to amend the judgment in favor of O'Daniel against Parkview to make it conditional.

Having made the judgment on the indemnification claim conditional, it is not necessary for this Court to pass on the contention that the Agreement Not To Execute bars any payment by O'Daniel to Saalfrank.

Parkview's contention that the judgment on indemnification would require it to pay to O'Daniel more than the amount it will have to pay to plaintiff is plainly not well taken in view of the fact that Ohio law makes the original tortfeasor liable for the damages actively caused by one who negligently supplies medical services to the victim. *See Tanner* v. *Espey*, 128 Ohio St. 82 (1934). In any event, this objection too is cured by making the judgment conditional.

The Court has difficulty[4] in understanding how its judgment can be read to make Parkview liable for the full amount of plaintiff's judgment of $150,000, or that it forces Parkview to pay the judgment twice. It would appear that the language is clear enough that only a lawyer could misconstrue it. Naturally Parkview would prefer

4. This issue reminds the Court of the observation by the judge who, when asked to reconsider his ruling, said: "I know that you believe you understand what you think I said, but I am not sure you realize that what you heard is not what I meant."

that no judgment at all be entered against it; however, the evidence dictates otherwise.

Finding no merit in any of Parkview's remaining contentions, the Court concludes that the motions are not well taken.

Accordingly, it is

ORDERED that the Amended Judgment of February 21, 1975, be further amended as follows:

1) That the following be stricken from the judgment:

"Third-Party Plaintiff Melva M. O'Daniel have judgment against Third-Party Defendant Parkview Memorial Hospital on her Third-Party Complaint for indemnification and recover therefrom the sum of One Hundred Thousand Dollars;" and

2) That the following be inserted in its place:

"Upon payment by Melva M. O'Daniel of any sum in excess of Fifty Thousand Dollars to the Plaintiff Ned G. Saalfrank, that Third-Party Plaintiff Melva M. O'Daniel have judgment against Third-Party Defendant Parkview Memorial Hospital on her Third-Party Complaint for indemnification and recover therefrom such sums in excess of Fifty Thousand Dollars as she has actually paid."

Except as previously ordered,

IT IS FURTHER ORDERED that the motions to alter or amend judgment or in the alternative for a new trial be and hereby are overruled.

/s/ Nicholas J. Walinski
United States District Judge

Toledo, Ohio.
April 18, 1975.

APPENDIX F

No. 75-1991

No. 75-1992

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ned G. Saalfrank,
Plaintiff-Appellee,

v.

Melva M. O'Daniel,
Defendant and Third Party Plaintiff-Cross Appellant,

v.

Parkview Memorial Hospital, Inc.,
Third Party Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio, Western Division.

Decided and Filed April 14, 1976.

Before: WEICK, CELEBREZZE and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. The principal question in this case is whether the district court properly assumed ancillary jurisdiction of a direct claim by a plaintiff against a non-diverse third party defendant in a personal injury action where the only basis of jurisdiction was diversity of citizenship. We reverse for the reasons stated herein.

Ned Saalfrank, a resident of Indiana, was injured when his automobile was struck at an intersection near Napoleon,

Ohio by the automobile of Melva O'Daniel, an Ohio resident. The O'Daniel car pulled into the path of Saalfrank's automobile which had the right of way. Saalfrank was taken to a Napoleon, Ohio hospital where it was determined that he had sustained a compressive fracture of a lumbar vertebra in addition to other less serious injuries. Later the same day Saalfrank was transferred to Parkview Memorial Hospital at Fort Wayne, Indiana. An incident occurred four days later at Parkview Hospital which Saalfrank claims resulted from negligence of the hospital and greatly aggravated the injuries which he had suffered in the automobile accident.

On February 25, 1971 Saalfrank sued O'Daniel in the United States District Court for the Northern District of Ohio, Western Division at Toledo. On May 21, 1971 Saalfrank sued Parkview Memorial Hospital, Inc. in an Indiana state court. Subsequently O'Daniel filed third party complaints in the federal district court against Ford Motor Company (Ford), a Michigan corporation, Don Kremer Ford, Inc. (Kremer), an Ohio corporation and Parkview Memorial Hospital, Inc. (Parkview), an Indiana corporation. All were named as third party defendants pursuant to Rule 14(a), Fed. R. Civ. P., as persons who were or might be liable to O'Daniel for all or part of Saalfrank's claim against her. The plaintiff Saalfrank then filed an amended complaint in the district court naming Parkview, Ford and Kremer as defendants. The district court dismissed Saalfrank's claim against Parkview for lack of jurisdiction.

Prior to the filing of Saalfrank's first amended complaint or the third party complaints against Kremer and Parkview, when the only parties to the federal action were the plaintiff Saalfrank, the defendant O'Daniel and the third party defendant Ford, O'Daniel's insurance carrier paid Saalfrank $45,000 in return for Saalfrank's "Agreement Not to Execute." Under this agreement Saalfrank could not collect any additional damages from O'Daniel and he agreed that if he should recover in excess of $250,000 from any other persons for his injuries he would reimburse O'Daniel's insurer, Nationwide Insurance Company (Nationwide), to the full extent of such excess up to $45,000. After this settlement had been made Saalfrank's attorney recommended that O'Daniel's attorney make Parkview a third party defendant and prepared the pleadings to this end which O'Daniel's attorney signed and filed. Saalfrank's attorney wrote to O'Daniel's attorney, ". . . you have a great deal to gain and nothing to lose by making the hospital your defendant on the theory that you are entitled to indemnification . . . I should not deny that our purpose in proposing this action has the ulterior motive of making it possible to also make the hospital the defendant of Mr. Saalfrank in the same proceedings . . . ." Prior to trial Nationwide was made a third party plaintiff on Ford's motion.

Meanwhile the action of Saalfrank against Parkview proceeded to trial in the Indiana state court and ended in a hung jury. The state action had not been retried when the district court at Toledo held a pre-trial conference on April 29, 1974. At that time Parkview was in the federal court case only as a third party defendant to the claim of O'Daniel for indemnification. In its pre-trial order the district court directed that all parties would be deemed to have waived jury trial unless their requests were reinstated before May 6, 1974. The parties did not reinstate their previous demands for jury trial and the case was eventually tried by the court beginning on May 28, 1974. On May 20, 1974 Ford and Kremer were permitted to file a cross-claim against Parkview.

At the conclusion of the trial an order was entered determining "that a verdict for the plaintiff will be entered as against the defendant O'Daniel, but the question of damages will remain under advisement." The order dismissed the complaint and third party complaints against Ford and Kremer on a finding that there was no probative evidence that any defect in the O'Daniel vehicle had contributed to the collision with the Saalfrank automobile. The court took the third party complaint of O'Daniel against Parkview under advisement. Saalfrank then made a motion under Rule 54(b), Fed. R. Civ. P., for the court to vacate its order dismissing the complaint of Saalfrank against Parkview. The court denied this motion, holding that diversity would be destroyed if Parkview were made a party defendant and this would "divest this Court of subject-matter jurisdiction."

Undaunted by two previous denials, the plaintiff again renewed his motion to vacate the order dismissing his complaint against Parkview. The district court reconsidered its previous rulings and concluded that it was appropriate to exercise pendent jurisdiction over Saalfrank's claim against Parkview. *Saalfrank* v. *O'Daniel*, 390 F. Supp. 45-53 (N.D. Ohio 1974). After denying Parkview's motion to reconsider, *Id.* at 53-58 (1975), the court entered its findings of fact and conclusions of law and a judgment in favor of Saalfrank for $150,000 against O'Daniel and Parkview "jointly and severally." On motion of O'Daniel the judgment was amended to read, in part,

> that defendant Melva M. O'Daniel be jointly and severally liable for the full sum of $150,000.00; and that Third-Party Defendant Parkview Memorial Hospital be severally liable for the sum of One Hundred Thousand Dollars. Third Party Plaintiff Melva M. O'Daniel have judgment against Third-Party Defendant Parkview Memorial Hospital on her Third-Party Complaint for indemnification and recover therefrom the sum of One Hundred Thousand Dollars.

Parkview filed a motion to set aside the amended judgment and dismiss Parkview, or, in the alternative for a new trial. The district court denied this motion and entered a second amended judgment which provided, in part, as follows:

> It is Ordered and Adjudged that plaintiff Ned G. Saalfrank have judgment against defendant Melva M. O'Daniel and Third Party Defendant Parkview Memorial Hospital and recover therefrom the sum of $150,000.00 together with interest at the rate of 6% per annum and the costs of this action: that defendant Melva M. O'Daniel be jointly and severally liable for the full sum of this judgment of $150,000.00, and that Third Party Defendant Parkview Memorial Hospital be severally liable for only the sum of $100,000.00 of this judgment.
>
> Upon payment by Melva M. O'Daniel of any sum in excess of $50,000.00 to the plaintiff Ned G. Saalfrank, Third Party Plaintiff Melva M. O'Daniel shall have judgment against Third Party Defendant Parkview Memorial Hospital on her Third Party Complaint for indemnification and recover therefrom such sums in excess of $50,000.00 as she has actually paid.

Parkview has raised a number of issues on appeal. However, the court's conclusion that the district court erred in deciding Saalfrank's claim against Parkview in this action disposes of the entire appeal. The district court held that it had pendent jurisdiction over Saalfrank's claim against Parkview primarily on the basis of *Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). That case is distinguishable from the present one in at least two critical

respects. First, and most important, jurisdiction of the federal court in *Gibbs* was based on a "federal question"; damages were sought under Section 303 of the Labor Management Relations Act of 1947. Second, the pendent state claim asserted by the plaintiff was against the same defendant as the federal claim. In the present case subject-matter jurisdiction of the claim against O'Daniel rested solely on diversity of citizenship, not on a federal question. Furthermore, the so-called pendent claim was against Parkview, not against the defendant O'Daniel and there was no diversity between Saalfrank and Parkview.

In *Gibbs* the Supreme Court stated that the justification for the doctrine of pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants; . . . ." *Id.* at 726. In the first instance there must be a federal claim having "substance sufficient to confer subject matter jurisdiction on the court." *Id.* at 725. When the existence of such a claim is established a federal court may, in its discretion and in consideration of judicial economy, convenience and fairness, exercise its judicial power to decide related state claims "which derive from a common nucleus of operative fact." *Id.* The Court did not hold in *Gibbs* that a federal court has the power to decide a purely state claim in the absence of a related substantial federal claim, that is, one "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. Const., Art. III. § 2. *Gibbs, supra,* at 725.

We have been directed to no Sixth Circuit decisions precisely in point. In *McPherson* v. *Hoffman,* 275 F.2d 466 (6th Cir. 1960), this court held that a railroad employee who was injured in an accident between his employer's truck and another vehicle could not sue the other driver

whose residence was the same as plaintiff's in federal court either separately or as a co-defendant with his employer. The action against Hoffman's employer was brought under the Federal Employer's Liability Act (FELA). In light of the decision in *Mine Workers* v. *Gibbs, supra,* if a case similar to *McPherson* were presented today it would be necessary to determine whether an FELA case affords a sufficiently substantial federal question basis of jurisdiction to support a pendent state law claim.

The *Gibbs* doctrine of pendent jurisdiction was relied upon in *Ohio Hoist Manufacturing Co.* v. *LiRocchi,* 490 F.2d 105 (6th Cir. 1974). There it was held that a federal court with jurisdiction of a claim arising under a federal statute which did not explicitly permit recovery of damages for its violation has pendent jurisdiction of a non-federal claim for damages resulting from violation of the federal statute.

This court has also held that where diversity exists between plaintiffs and defendants, it is not necessary that there be independent grounds of jurisdiction between the plaintiffs and third party defendants against whom the plaintiffs seek no relief. *Stemler* v. *Burke,* 344 F.2d 393 (6th Cir. 1965); *Huggins* v. *Graves,* 337 F.2d 486 (6th Cir. 1964). Further, where there is complete diversity between all plaintiffs and all defendants and the jurisdictional amount prescribed by 28 U.S.C. § 1332 is met as to one or more of the defendants, it has been held that a federal court has pendent jurisdiction to decide the claims against all defendants arising out of the same transaction or controversy. *F. C. Stiles Contracting Co.* v. *Home Insurance Co.,* 431 F.2d 917 (6th Cir. 1970); *Beautytuft, Inc.* v. *Factory Insurance Association,* 431 F.2d 1122 (6th Cir. 1970). *See Rosado* v. *Wyman,* 397 U.S. 397, 405 n. 6 (1970).

None of the Sixth Circuit cases relied upon by Saalfrank involved a claim for recovery by a plaintiff against a non-diverse third party defendant where the sole basis of jurisdiction of the action was diversity of citizenship.

Strictly speaking, a case such as the present one involves ancillary, rather than pendent jurisdiction. See Wright, *Law of Federal Courts* (2d ed.) at 65. *Mine Workers* v. *Gibbs, supra,* was concerned with pendent jurisdiction only. The Supreme Court does not appear to have decided whether the doctrine of ancillary jurisdiction empowers a federal court to decide a direct claim by a plaintiff against a non-diverse third party defendant in the absence of an independent jurisdictional basis. In *Moor* v. *County of Alameda,* 411 U.S. 693 (1973) and *Hagans* v. *Lavine,* 415 U.S. 528 (1974), as well as in *Seals* v. *Quarterly County Court,* 526 F.2d 216 (6th Cir. 1975), the federal court had jurisdiction based on a substantial federal question and the claims arising under state law were asserted under the court's pendent jurisdiction. Furthermore, third party defendants were not involved.

The Fourth Circuit decided the very issue now before this court in *Kenrose Mfg. Co.* v. *Fred Whitaker Co., Inc.,* 512 F.2d 890 (1972). The court considered the post-*Gibbs* trend among some district courts to dispense with the requirement of an independent basis of jurisdiction and the views of several distinguished commentators. Nevertheless, it affirmed the district court's dismissal of the plaintiff's amended complaint setting up a claim against a non-diverse third party defendant, noting that—

> With impressive consistency the overwhelming majority has held an independent jurisdictional basis to be a prerequisite to the maintenance of such a claim. 512 F.2d at 893. (citations omitted).

Parker v. *W. W. Moore & Sons, Inc.,* ..... F.2d ..... (4th Cir. Sept. 30, 1975), followed the ruling in *Kenrose,* "at least in the circumstances of a case such as this," after noting criticism of the *Kenrose* decision by several commentators.

Since the Supreme Court has not spoken on this important jurisdictional question we are not disposed to adopt an inflexible rule of general application. However, we have no hesitancy in concluding that the district court abused its discretion in permitting Saalfrank to recover from Parkview in the present case. This case was peculiarly unsuitable for the exercise of ancillary jurisdiction over the claim of Saalfrank against Parkview. The action in the Indiana state court was tried to a jury more than one year before the trial in the present case. If the Indiana proceedings had ended in a verdict for either party rather than a hung jury the prevailing party would have been entitled to a judgment which would have been *res judicata* as to all issues between Saalfrank and Parkview. The fact that the first trial ended in a mistrial should not oust the Indiana ate court of jurisdiction to adjudicate a malpractice action by an Indiana resident against an Indiana hospital. The State of Indiana has a significant interest in such an action.

Further, we find no authority in Rule 54(b) for "realigning the parties" after the trial was completed. Rule 54(b) is designed to permit appeals from partial judgments when one or more, but less than all claims are decided. In the present case the court purported to decide all the claims of all the parties, including those between Saalfrank and Parkview which Parkview had every right to believe, based on the previous rulings of the trial judge, were not within the jurisdiction of the district court. In certain circumstances Rule 15, Fed. R. Civ. P., may be availed

of to permit an amendment after judgment and a realigning of parties. However, this may only be done if all parties have notice of the issues being tried and no prejudice will result. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). When Parkview permitted the case to be tried without reinstating its demand for a jury trial the court had ruled that Saalfrank could not proceed against Parkview in the action. Since Parkview was only in the case with respect to a third party complaint claiming indemnity, its counsel might properly have concluded that a jury trial would be of no particular benefit to it. The considerations on whether to reinstate the jury demand could certainly have been quite different if Parkview had known it would be required to defend Saalfrank's claim directly, with Ford and Kremer as well as O'Daniel as co-defendants and an insurance company as one of the plaintiffs. From the record it would be impossible to conclude that Parkview suffered no prejudice from the reversal of the district court's previous rulings.

The second amended judgment awarded damages of $150,000 to Saalfrank and provided for indemnification in favor of O'Daniel against Parkview for any sum in excess of $50,000 actually paid to Saalfrank by O'Daniel. The indemnification award was based on O'Daniel's third party complaint against Parkview. However, by reason of Nationwide's previous payment to Saalfrank and the terms of the "Agreement Not to Execute," O'Daniel was completely shielded from any requirement to pay Saalfrank additional sums in excess of the $45,000 already paid. Under these circumstances no right to indemnification exists.

The judgment of the district court is reversed on Parkview's appeal. The amended complaint by which Saalfrank sought recovery from Parkview and the third party com-

plaint of O'Daniel against Parkview are dismissed. The judgment is affirmed on the cross-appeal of O'Daniel. The appellant Parkview will recover from the appellee Saalfrank and the cross-appellant O'Daniel its costs on appeal.

APPENDIX G

No. 75-1991

No. 75-1992

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NED G. SAALFRANK
Plaintiff-Appellee

v.

MELVA M. O'DANIEL
Defendant and Third Party Plaintiff-
Cross Appellant

v.

PARKVIEW MEMORIAL HOSPITAL, INC.
Third Party Defendant-Appellant

ORDER

(Filed June 4, 1976)

BEFORE: WEICK, CELEBREZZE and LIVELY, Circuit Judges.

Petitions for rehearing have been filed herein by the plaintiff-appellee Ned G. Saalfrank and the defendant and third party plaintiff-cross appellant Melva M. O'Daniel. Each of the petitioners has suggested that the petitions for rehearing should be heard en banc by this court.

No member of the court having requested rehearing en banc, the petitions have been referred to the panel which heard the original appeal and cross appeal for disposition.

Upon consideration of both petitions for rehearing filed herein, the court concludes that all issues raised therein were considered upon the original submission of these appeals and that a rehearing is not required. Therefore, the petitions for rehearing of the plaintiff-appellee Ned G. Saalfrank and the defendant and third party plaintiff-cross appellant Melva M. O'Daniel are hereby denied.

Entered by Order of the Court
/s/ John P. Hehman
Clerk

Supreme Court of the United States

October Term, 1976

No. 76-299

NED G. SAALFRANK,
Petitioner,

vs.

PARKVIEW MEMORIAL HOSPITAL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS W. YODER
C. ERIK CHICKEDANTZ
LIVINGSTON, DILDINE, HAYNIE & YODER
425 Lincoln Bank Tower
Fort Wayne, Indiana 46802

JOHN M. CURPHEY
ROBISON, CURPHEY & O'CONNELL
425 Libbey-Owens-Ford Building
Toledo, Ohio 43624
Counsel for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Opinions Below 1

Questions Presented 1

Constitutional Provision Involved 2

Statement of the Case 3

Argument 7

There Is No Conflict Among the Circuit Courts of Appeals With Respect to the Holding in This Case by the United States Court of Appeals for the Sixth Circuit Regarding the Jurisdictional Issue 7

The Circumstances of This Case Make It Particularly Unsuited for the Exercise of Pendent or Ancillary Jurisdiction 15

The Court of Appeals' Holding in This Case Does Not Conflict With Any Decision of the Supreme Court of the United States 20

Rule 54, Federal Rules of Civil Procedure, Does Not Authorize the Retroactive Extension of Jurisdiction Over a State Law Claim Upon Which Issues Have Neither Been Formed nor Tried 22

Conclusion 24

TABLE OF AUTHORITIES

Cases

Aetna Cas. & Sur. Co. v. Buckeye Union Casualty Co. (1952), 157 Ohio St. 385, 105 N.E.2d 568 19
Aldinger v. Howard (1976), ... U.S. ....., 49 L. Ed. 2d 276 ..... 20, 21
Ayoub v. Helm's Express, Inc. (W.D., Pa., 1969), 300 F. Supp. 473 13
Beautytuft, Inc. v. Factory Ins. Assoc. (6th Cir., 1970), 431 F.2d 1122 ..... 9, 12
Campbell v. The Triangle Corporation, et al. (E.D., Pa., 1972), 56 F.R.D. 480 13
F. C. Stiles Contracting Co. v. Home Ins. Co. (6th Cir., 1970), 431 F.2d 917 ..... 9, 12
Hatridge v. Aetna Cas. & Sur. Co. (8th Cir., 1969), 415 F.2d 809 ..... 9, 11, 12
Heintz & Co., Inc. v. Provident Tradesmens Bank and Trust Company (E.D., Pa., 1962), 30 F.R.D. 171 16
Hurn v. Oursler (1933), 289 U.S. 238, 77 L. Ed. 1148 13
Hymer v. Chai (9th Cir., 1969), 407 F.2d 136 ..... 11, 12
Insurance Company of North America v. Blindauers Sheet Metal and Heating Co. (E.D., Wisc., 1973), 61 F.R.D. 323 13
Jacobson v. Atlantic City Hosp. (3rd Cir., 1968), 392 F.2d 149 ..... 9, 11
Jones, et al. v. City of Houma (E.D., La., 1972), 339 F. Supp. 473 13
Joseph, et al. v. Chrysler Corp., et al. (W.D., Pa., 1973), 61 F.R.D. 347 13
Kenrose Mfg. Co. v. Fred Whitaker Company, et al. (W.D., Va., 1971), 53 F.R.D. 491 13

Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc. (4th Cir., 1972), 512 F.2d 890 ..... 9, 10
Lawes v. Nutter (S.D., Tex., 1968), 292 F. Supp. 890 13
Maryland Casualty Co. v. Frederick Co. (1944), 142 Ohio St. 605, 53 N.E.2d 795 19
Mickelic v. United States Postal Service (W.D., Pa., 1973), 367 F. Supp. 1036 13
Olivieri v. Adams, et al. (E.D., Pa., 1968), 280 F. Supp. 428 13
O'Neill v. City of Cleveland (1945), 145 Ohio St. 563, 62 N.E.2d 353 19
Parker v. W. W. Moore & Sons, Inc. (4th Cir., 1975), 528 F.2d 764 ..... 10, 11, 18
Robison, et al. v. Castello, et al. (E.D., La., 1971), 331 F. Supp. 667 13
Seyler v. Steuben Motors, Inc., et al. (3rd Cir., 1972), 462 F.2d 181 11
Sherrel, et al, v. Mitchell Aero, Inc. (E.D., Wisc., 1971), 340 F. Supp. 219 13
Stone v. Stone (4th Cir., 1968), 405 F.2d 94 ..... 9, 12
United Mine Workers v. Gibbs (1966), 383 U.S. 715, 16 L. Ed. 2d 218 ..... 7, 8, 9, 13
United Pacific, et al. v. City of Lewiston (D., Ida., 1974), 372 F. Supp. 700 13
Wilson v. American Chain & Cable Co. (3rd Cir., 1966), 364 F.2d 558 ..... 9, 11, 12
Wittersheim v. General Transportation Services, Inc. (E.D., Va., 1974), 378 F. Supp. 762 10
Wolgin v. Atlas United Financial Corporation (E.D., Pa., 1975), 397 F. Supp. 1003 13

Text

RESTATEMENT OF RESTITUTION, §§76-77, 80 and 96 19

Constitution, Statutes and Rules

Constitution of the United States, Article III, §2, Clause 1 ..... 2, 8, 20, 21

Federal Rules of Civil Procedure:

Rule 54 22
Rule 54(b) 2, 6, 23

28 U.S.C. §1332(a) 2, 3, 7
28 U.S.C. §1343 20
42 U.S.C. §1983 20

Supreme Court of the United States

October Term, 1976

No. 76-299

NED G. SAALFRANK,
Petitioner,

vs.

PARKVIEW MEMORIAL HOSPITAL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 533 F.2d 325. This opinion reversed the decision of the District Court for the Northern District of Ohio, Western Division, which is reported at 390 F. Supp. 45.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over third-party defendant, Parkview Memorial Hospital, Inc., Respondent herein, so as to enter judgment in favor of plaintiff, Ned G. Saalfrank, Petitioner herein, an Indiana

resident, and against Respondent, an Indiana corporation not doing business in the State of Chio, when the original basis for subject matter jurisdiction of the District Court was founded on diversity of citizenship pursuant to 28 U.S.C. §1332(a) and the party which impleaded Respondent under an alleged right of indemnification, in fact, had no such right of indemnification.

2. Whether a District Court, pursuant to Rule 54(b), Federal Rules of Civil Procedure, may retroactively realign parties four (4) months after trial so as to make Respondent (a third-party defendant during trial) a direct defendant of Petitioner (plaintiff during trial).

CONSTITUTIONAL PROVISION INVOLVED

In addition to the statute and rules of court involved as set forth in Petitioner's Petition for Writ of Certiorari (p. 2), the following provision of the Constitution of the United States is also involved:

Article III, §2, Clause 1:

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies of which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

STATEMENT OF THE CASE

This is a civil action in negligence commenced by Saalfrank, a citizen and resident of Indiana, against O'Daniel, a citizen and resident of Ohio, on February 25, 1971. Jurisdiction of the District Court was based solely upon diversity of citizenship pursuant to 28 U.S.C. §1332 (a). The Complaint sought to recover for personal injuries sustained by Saalfrank in an automobile accident occurring near the City of Napoleon, Ohio on May 25, 1969, involving an automobile occupied by Saalfrank and an automobile operated by O'Daniel. Shortly thereafter, on May 21, 1971, Saalfrank instituted a lawsuit in the Allen Superior Court of Allen County, State of Indiana, against Parkview, alleging personal injuries caused by the negligence of Parkview while Saalfrank was a patient in the hospital on or about May 29, 1969.

On November 5, 1971, Saalfrank, O'Daniel and O'Daniel's insurance company, Nationwide Insurance Company, executed a document entitled "Agreement Not To Execute By And Among Ned G. Saalfrank, Melva M. O'Daniel And Nationwide Insurance Company." Pursuant to such Agreement, Nationwide, in behalf of O'Daniel agreed to pay Saalfrank the sum of Forty-Five Thousand Dollars ($45,000.00). In consideration of such payment, Saalfrank agreed he would make no further attempt to collect any additional amount from either O'Daniel or Nationwide. Additionally, Saalfrank agreed to reimburse Nationwide for the aforementioned payment of Forty-Five Thousand Dollars ($45,000.00) to the extent that his recovery against any other party exceeded Two Hundred Fifty Thousand Dollars ($250,000.00).

Having settled his case with O'Daniel and Nationwide, Saalfrank's counsel, Mr. Wyneken, then corresponded with

counsel for defendant O'Daniel and Nationwide, and recommended defendant make Parkview a third-party defendant. To assist O'Daniel's counsel in so doing, Saalfrank's counsel prepared for O'Daniel's use a Motion with Memorandum, a proposed Complaint, a proposed Order, a proposed instruction form for the U. S. Marshal, and a proposed Summons. A week later, November 18, 1971, Saalfrank's counsel again corresponded with O'Daniel's counsel wherein he stated that his (Saalfrank's counsel) recommended strategy of making Parkview a third-party defendant was correct and that defendant would have much to gain and nothing to lose by impleading Parkview as a third-party defendant. Saalfrank's counsel then stated that his "ulterior motive" in this strategy was to allow Saalfrank to assert a direct claim against Parkview.

On January 21, 1972, O'Daniel filed her third-party action against Parkview on the theory of indemnification and/or contribution. Shortly thereafter, April 28, 1972, Saalfrank filed his pleading designated as "Third-Party Complaint" so as to assert a direct claim against Parkview. Pursuant to Parkview's motion, this claim was dismissed by the Trial Court on October 6, 1972 on the grounds that there was no diversity between Saalfrank and Parkview.

In the meantime, during June, 1973, Saalfrank tried his action against Parkview in the state court of Indiana (Allen Superior Court, Fort Wayne, Indiana) which ended in a hung jury. That case has been pending re-trial since then.

Following the joinder of O'Daniel's liability insurance carrier, Nationwide Insurance Company, as the real party in interest in lieu of O'Daniel, and with the issues duly made up, a trial to the District Court was commenced on May 28, 1974, the right to a jury trial having previously

been waived subsequent to pre-trial conference. The trial was concluded on June 3, 1974. At its conclusion, the District Court directed that no probative evidence existed to impose liability on third-party defendants, Ford Motor Company or Don Cramer Ford, Inc., and accordingly, dismissed all claims against them asserted by Saalfrank and O'Daniel.

On June 21, 1974, three (3) weeks after trial, Saalfrank filed a Motion for Vacation of Interlocutory Order requesting, again, that he be allowed to assert a direct claim for relief against Parkview. This motion was denied on June 26, 1974, and no direct claim was allowed.

On September 18, 1974, Saalfrank filed a Renewed Motion for Vacation of Interlocutory Order. The Trial Court, by its Memorandum and Order of September 27, 1974 (four months after the trial) granted this motion and allowed Saalfrank to assert a direct claim against Parkview.

Thereafter, following two (2) amendments, the District Court entered judgment in favor of Saalfrank and directly against Parkview. It also granted O'Daniel an indemnification judgment against Parkview conditioned upon O'Daniel's payment to Saalfrank of monies in excess of Fifty Thousand Dollars ($50,000.00).

In reversing the District Court, the United States Court of Appeals for the Sixth Circuit, reviewing and relying on authority from other circuits involving this jurisdictional point, concluded that an independent basis of jurisdiction would be necessary before Saalfrank could directly sue and recover from Parkview, a non-diverse third-party defendant in a federal court. In addition to the authority from other circuits which supported this position, the Court of Appeals also emphasized the fact that the state courts

of Indiana had already acquired jurisdiction over the malpractice action brought by Saalfrank, an Indiana resident, against Parkview, an Indiana hospital. The Court observed that the "State of Indiana has a significant interest in such an action" (Pet. App., p. A29).

In holding that the District Court erred in retroactively realigning the parties nearly four (4) months following trial pursuant to Rule 54(b), Federal Rules of Civil Procedure, so as to allow Saalfrank to assert a direct claim against Parkview, the Court of Appeals concluded that this rule was not designed to permit realignment of parties after trial such as attempted by the District Court in this case. Especially since Parkview had "every right to believe, based on the previous ruling of the trial judge", that the direct claim by Saalfrank was not within the jurisdiction of the District Court (Pet. App., p. A29).

The Court of Appeals also was troubled with the prejudice which would occur to Parkview under the District Court's application of Rule 54(b). The Court noted that when Parkview permitted the case to be tried without reinstating its demand for a jury trial, the District Court had already ruled that it had no subject matter jurisdiction to entertain Saalfrank's direct claim against Parkview. Had such a direct claim been permitted prior to waiver of right to jury trial by Parkview, the Court of Appeals observed that the considerations on the part of Parkview in deciding whether to waive jury trial would have been much different (Pet. App., p. A30).

Finally, the Court of Appeals held that under the record before it, O'Daniel had no right of indemnification against Parkview in light of its "Agreement Not To Execute" which completely shielded O'Daniel and her insurer from payment of any monies to Saalfrank on behalf of Parkview (Pet. App., p. A30).

ARGUMENT

There Is No Conflict Among the Circuit Courts of Appeals With Respect to the Holding in This Case by the United States Court of Appeals for the Sixth Circuit Regarding the Jurisdictional Issue.

The Court of Appeals, in the case at bar, held that the District Court erred when it allowed Saalfrank, an Indiana resident, in an action based solely on diversity of citizenship pursuant to 28 U.S.C. §1332(a), to assert a direct claim against Parkview, an Indiana hospital, in the absence of an independent ground of subject matter jurisdiction between the two. Parkview had originally been impleaded by O'Daniel, an Ohio defendant whom Saalfrank originally sued.

In support of his Petition for Writ of Certiorari, Saalfrank argues that a conflict exists among the various circuit courts on this issue, and, accordingly, certiorari should be granted (Pet., p. 8, 9).

Parkview respectfully submits that no conflict exists, and in fact, those circuits which have dealt with this issue are in accord with the holding of the United States Court of Appeals for the Sixth Circuit in this case.

As the Court of Appeals accurately observed, the District Court exercised pendent jurisdiction over Parkview primarily on the authority of *United Mine Workers v. Gibbs* (1966), 383 U.S. 715, 16 L. Ed. 2d 218. However, this decision is distinguishable on two important grounds. First and foremost, *Gibbs* found the *power* to exercise pendent jurisdiction over a state claim based upon the existence of a "substantial federal claim" to which the state claim was so closely related as to permit the conclu-

sion that the entire action was but one constitutional case. No such "substantial federal claim" is presented in the case at bar as this is a case based solely on state law. The basis for subject matter jurisdiction is diversity of citizenship only.

Secondly, the Court of Appeals also pointed to the fact that *Gibbs* involved an additional claim asserted against the same defendant. It did not involve a plaintiff asserting a claim against a third-party defendant over whom no independent basis for jurisdiction existed.

Accordingly, the Court of Appeals rightfully concluded that *Gibbs* and its progeny did not afford a basis for permitting Saalfrank to assert a direct claim against Parkview, a non-diverse party, since no "substantial federal claim" was present, and to allow such a direct claim would destroy complete diversity of citizenship.

It cannot be forgotten that in dealing with the matter of diversity of citizenship, we are dealing with a constitutional rather than a legislative question. Unlike questions relating to the "amount in controversy", on which the Constitution of the United States is silent and in connection with which legislative discretion is permitted, the Constitution of the United States requires as a condition precedent to the exercise of judicial power in cases where no federal question is involved, that the controversy be "between citizens of different states." Article III, §2.

Within the area of this limitation, no room exists for the exercise of legislation—judicial or otherwise.

Numerous circuits, in dealing with situations wherein complete diversity exists but one or more of the plaintiffs' claims fail to satisfy the "amount in controversy" requirement of Ten Thousand Dollars ($10,000.00), have held that, under the concept of pendent jurisdiction as set forth

in *Gibbs*, all of the claims may be heard in the federal case. *Jacobson v. Atlantic City Hosp.* (3rd Cir., 1968), 392 F.2d 149; *Wilson v. American Chain & Cable Co.* (3rd Cir., 1966), 364 F.2d 558; *Stone v. Stone* (4th Cir., 1968), 405 F.2d 94; *F. C. Stiles Contracting Co. v. Home Ins. Co.* (6th Cir., 1970), 431 F.2d 917; *Beautytuft, Inc. v. Factory Ins. Assoc.* (6th Cir., 1970), 431 F.2d 1122; *Hatridge v. Aetna Cas. & Sur. Co.* (8th Cir., 1969), 415 F.2d 809. Not so, however, in situations where to permit the claim would destroy complete diversity of citizenship.

In an effort to show a conflict among the circuits on this question, Saalfrank points to the Third, Fourth, Sixth and Tenth Circuits as those taking a "generally restrictive" view of the application of pendent or ancillary jurisdiction to this case while citing the Eighth and Ninth Circuits as those taking a more liberal position on the question (Pet., p. 8, 9). Parkview would suggest, however, that *no such conflict exists.*

The Fourth Circuit has addressed the precise issue herein presented and held that no *power* exists on the part of a federal district court to destroy complete diversity of citizenship through the utilization of pendent jurisdiction. In *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.* (4th Cir., 1972), 512 F.2d 890, a Virginia plaintiff amended its Complaint to assert a direct claim against a Virginia third-party defendant who had been impleaded by a Pennsylvania defendant. In affirming the trial court's dismissal and holding that such a claim would exceed the limits of the Court's power absent an independent jurisdictional basis, Judge Sobeloff wrote:

> "Notwithstanding the acknowledged relaxation of jurisdictional requirements in federal third-party practice, *we agree with the District Judge that the course of action proposed by plaintiff would exceed the limits*

of the court's power. We therefore affirm the District Court's order dismissing the amended complaint against the third-party defendant for lack of subject-matter jurisdiction." (512 F.2d at 892) (Emphasis added).

With respect to any "conflict" existing regarding the question of whether an independent basis of jurisdiction was needed for a plaintiff to pursue a third-party defendant, Judge Sobeloff observed:

> "Many courts have considered whether an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. *With impressive consistency the overwhelming majority has held an independent jurisdictional basis to be a prerequisite to the maintenance of such a claim."* (512 F.2d at 893) (Emphasis added).

More recently, in *Parker v. W. W. Moore & Sons, Inc.* (4th Cir., 1975), 528 F.2d 764, the Fourth Circuit was confronted with the question of whether ancillary jurisdiction exists in a diversity case so as to permit a plaintiff to directly assert a claim against a non-diverse third-party defendant. The Court again held that an independent ground of jurisdiction had to exist between plaintiff and the third-party defendant. The Court, through Judge Haynsworth, expressly condemned what it termed a misuse of the doctrine of pendent jurisdiction in *Wittersheim v. General Transportation Services, Inc.* (E.D., Va., 1974), 378 F. Supp. 762[1] by stating:

> "It [pendent/ancillary jurisdiction] was not designed to bring into the diversity jurisdiction claims between

1. This case was decided after *Kenrose Mfg. Co. v. Fred Whitaker Co.* (4th Cir., 1972), 512 F.2d 890, but *before* the *Kenrose* opinion was published and accordingly, should not be considered as conflicting authority.

> parties who are citizens of the same state." (528 F.2d at 766)

Likewise, the Third Circuit has disallowed the assertion of pendent or ancillary jurisdiction so as to destroy diversity of citizenship. In *Seyler v. Steuben Motors, Inc., et al.* (3rd Cir., 1972), 462 F.2d 181, the court expressly held that the "amount in controversy" cases, including the *Jacobson* and *Wilson* cases, *supra,* were inapplicable and provide no precedent for an action between citizens of the same state, in a Federal Court, when there is no Federal claim involved:

> *"Appellants' reliance on the doctrines of pendent or ancillary jurisdiction is misplaced. This is not a commingling of a state claim with one based on a federal question.* United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); nor do the claims come within the ambit of Borror v. Sharon Steel Co., 327 F.2d 165 (3rd Cir., 1964). Wilson v. American Chain & Cable Co., 364 F.2d 558 (3rd Cir., 1966), and Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3rd Cir., 1968), also relied upon by appellant, dealt with amounts in controversy and not the doctrine of complete diversity." (462 F.2d 181-182) (Emphasis added).

Saalfrank's assertion that the Eighth and Ninth Circuits are in conflict with the Third, Fourth, Sixth and Tenth Circuits is ill-founded. Saalfrank cites *Hatridge v. Aetna Cas. & Sur. Co.* (8th Cir., 1969), 415 F.2d 809 and *Hymer v. Chai* (9th Cir., 1969), 407 F.2d 136, in support of this proposition. However, a perusal of these decisions evinces no conflict at all.

In *Hatridge*, complete diversity existed between plaintiffs (two husbands and their wives), residents of Arkan-

sas, and defendant, a foreign insurance company doing business in Arkansas. In fact, the *Hatridge* case involves an "amount in controversy" situation where one or more of the plaintiffs did not have a claim exceeding the jurisdictional amount of Ten Thousand Dollars ($10,000.00). By way of the concept of pendent jurisdiction, all claims were allowed to be pursued in the Federal Court since at least one of them exceeded the required jurisdictional amount and the claims were closely intertwined and interdependent.

Decisions from the Third, Fourth, and Sixth Circuits have allowed the application of pendent jurisdiction to "amount in controversy" situations as well. See *Wilson v. American Chain & Cable Co.* (3rd Cir., 1966), *supra; Stone v. Stone* (4th Cir., 1968), *supra; F. C. Stiles Contracting Co. v. Home Ins. Co.* (6th Cir., 1970), *supra; Beautytuft, Inc. v. Factory Ins. Assoc.* (6th Cir., 1970), *supra.* In each of these cases, complete diversity existed.

Saalfrank's reliance on *Hymer v. Chai* (9th Cir., 1969), 407 F.2d 136, as demonstrating a liberal approach to the application of pendent or ancillary jurisdiction is misplaced. If anything, *Hymer* demonstrates the most *restrictive* stand of any of the circuits with regard to pendent or ancillary jurisdiction. The *Hymer* case involved a diversity suit where, as in the aforecited cases, one of the plaintiffs' claims did not exceed Ten Thousand Dollars ($10,000.00). The Ninth Circuit held that there was no jurisdictional power, pendent or otherwise, to entertain the claim which failed to satisfy the amount in controversy requirement.

Saalfrank has failed to demonstrate any conflict among the various circuits with regard to the application of pendent or ancillary jurisdiction to the instant situation. Just the opposite is true. Those circuits that have dealt with

the issue have consistently held that a plaintiff must have an independent basis for jurisdiction before it can proceed directly against a third-party defendant where original subject matter jurisdiction is founded on diversity of citizenship alone.

Not surprisingly, the decisions from the district courts give one-sided support to this proposition as well. See *Wolgin v. Atlas United Financial Corporation* (E.D., Pa., 1975), 397 F. Supp. 1003; *United Pacific, et al. v. City of Lewiston* (D., Ida., 1974), 372 F. Supp. 700; *Joseph, et al. v. Chrysler Corp., et al.* (W.D., Pa., 1973), 61 F.R.D. 347; *Mickelic v. United States Postal Service* (W.D., Pa., 1973), 367 F. Supp. 1036; *Insurance Company of North America v. Blindauers Sheet Metal and Heating Co.* (E.D. Wisc., 1973), 61 F.R.D. 323; *Campbell v. The Triangle Corporation, et al.* (E.D., Pa., 1972), 56 F.R.D. 480; *Jones, et al. v. City of Houma* (E.D., La., 1972), 339 F. Supp. 473; *Sherrell, et al. v. Mitchell Aero, Inc.* (E.D., Wisc., 1971), 340 F. Supp. 219; *Kenrose Mfg. Co. v. Fred Whitaker Company, et al.* (W.D., Va., 1971), 53 F.R.D. 491; *Robison, et al. v. Castello, et al.* (E.D., La., 1971), 331 F. Supp. 667; *Ayoub v. Helm's Express, Inc.* (W.D., Pa., 1969), 300 F. Supp. 473; *Lawes v. Nutter* (S.D., Tex., 1968), 292 F. Supp. 890; *Olivieri v. Adams, et al.* (E.D., Pa., 1968), 280 F. Supp. 428.

Typical of the foregoing cases is *Olivieri v. Adams, supra,* in which the court accurately summarized the United States Supreme Court's holding in *Hurn v. Oursler* (1933), 289 U.S. 238, 77 L. Ed. 1148, and *Gibbs, supra,* as follows:

> *"Hurn and Gibbs, as well as their forebears and their progeny all require a substantial federal question claim as the basis for the federal court's jurisdiction over a case before the federal court may exer-*

cise pendent jurisdiction over non-federal claims of the same plaintiff against the same defendant. The reason for the requirement appears clear enough. Federal questions are for the federal courts to decide. Assuming the existence of such a federal question, in order to avoid piecemeal litigation and to promote convenience and judicial economy, the doctrine of pendent jurisdiction permits (not requires) the federal courts to decide not only the federal question claims but also to adjudicate the state law claims in the same 'cause of action' (Hurn) or 'case' (Gibbs).

The reason underlying the doctrine, the special competence of the federal courts to decide federal questions, simply does not exist in diversity cases in which, under Erie R.R. Co. v. Tompkins, federal courts are required to apply state law. The cases before us, of course, involve no federal question claims, they present only state law claims." (280 F. Supp. at 430) (Emphasis added) (Footnotes omitted).

Adopting the language of the Court in *Olivieri, supra,* the case at bar involves "no federal question claims." It presents only "state law claims"; and, as between Saalfrank and Parkview the most it could ever present would be "state law claims" arising under the law of Indiana. As the Court of Appeals stated, "The State of Indiana has a significant interest in such an action." (Pet. App., p. A29).

It is unthinkable that a United States District Court in Ohio could assume jurisdiction of such claim, based on Indiana law when (1) no federal issue is involved; (2) diversity of citizenship does not exist; and (3) the very claim is pending retrial before the state courts of Indiana.

Respondent, Parkview, would request that the Petition for Writ of Certiorari be denied.

The Circumstances of This Case Make It Particularly Unsuited for the Exercise of Pendent or Ancillary Jurisdiction.

The Court of Appeals concluded that the District Court abused its discretion in permitting Saalfrank to recover from Parkview under the circumstances of this case (Pet. App., p. A29). While Parkview firmly believes that the District Court lacked the power to permit such a claim, nevertheless, the circumstances of this case make it especially inappropriate for the application of pendent or ancillary jurisdiction assuming arguendo, that such a power exists. Accordingly, the Petition for Writ of Certiorari should be denied.

First, the claim between Saalfrank and Parkview had already been tried in the state courts of Indiana and was pending retrial at the time of the federal trial. As the Sixth Circuit observed, "The fact that the first trial ended in a mistrial should not oust the Indiana state court of jurisdiction to adjudicate a malpractice action by an Indiana resident against an Indiana hospital. The State of Indiana has a significant interest in such an action." (Pet. App. p. A29).

Second, and more importantly, the purpose for impleading Parkview in the first instance was to allow Saalfrank to attempt to do indirectly that which he could not do directly—sue Parkview in a federal court.

Common sense, as well as case law, reveals that one of the primary reasons for requiring an independent jurisdictional ground before allowing a plaintiff to amend his complaint so as to assert a direct claim against a third-

party defendant involves the opportunity for collusion. It affords the plaintiff an opportunity, with the help of a friendly defendant, to do indirectly that which he cannot do directly.

The collusion that is sought to be averted was identified in *Heintz & Co., Inc. v. Provident Tradesmens Bank and Trust Company* (E.D., Pa., 1962), 30 F.R.D. 171, as being:

> ". . . That possibility [collusion] would certainly be present had a resident plaintiff been permitted to amend against a resident third party defendant. *Plaintiff would need only to select an original defendant who would cooperate in bringing on the record the defendant whom plaintiff really wanted.*" (30 F.R.D. at 174) (Emphasis added).

This is precisely what occurred in the case at bar. Prior to any attempts being made by O'Daniel to implead Parkview as a third-party defendant, Saalfrank, O'Daniel and her insurer, Nationwide, entered into an "Agreement Not To Execute". In effect, Saalfrank and O'Daniel settled their differences with the execution of this agreement on November 5, 1971.

Pursuant to this agreement, Nationwide paid Forty-Five Thousand Dollars ($45,000.00) to Saalfrank in return for Saalfrank's promise to make no further attempt to collect any additional amount, at any time, from either O'Daniel or Nationwide. Additionally, Saalfrank agreed that if he should recover in excess of Two Hundred Fifty Thousand Dollars ($250,000.00) from any other persons, he would reimburse Nationwide to the full extent of such excess up to Forty-Five Thousand Dollars ($45,000.00).

Subsequent to this agreement, Saalfrank's attorney recommended to O'Daniel's attorney that O'Daniel make

Parkview a third-party defendant in the federal action under the theory of indemnification. To assist O'Daniel in this respect, Saalfrank's attorney prepared and enclosed for O'Daniel's use, various pleadings, summonses, memoranda and other documents which O'Daniel's attorney signed and filed.

Then, Saalfrank's attorney candidly admitted the purpose of the entire scheme when he wrote to O'Daniel's attorney, stating: ". . . you have a great deal to gain and nothing to lose by making the hospital your defendant on the theory that you are entitled to indemnification . . . *I should not deny that our purpose in proposing this action has the ulterior motive of making it possible to also make the hospital the defendant of Mr. Saalfrank in the same proceedings . . .*" (Pet. App., p. A23). Subsequent thereto, O'Daniel impleaded Parkview as a third-party defendant under the theory of indemnification.

From the foregoing, it is manifest that with the execution of the "Agreement Not To Execute" on November 5, 1971, O'Daniel was no longer an adversary of Saalfrank. She and her insurer were strawmen in an action with "a great deal to gain and nothing to lose". They (O'Daniel and Nationwide) had clearly joined forces with Saalfrank in an effort to assist the latter in recovering against Parkview and in turn, hopefully recovering some of the insurer's payment.

O'Daniel's *only* function for remaining in this action was to bring in Parkview by way of the third-party action so that Saalfrank could amend his complaint and proceed directly against Parkview. As previously noted, Saalfrank's counsel candidly admitted this. In other words, Saalfrank's primary claim was against Parkview—not O'Daniel.

Under such circumstances, even assuming that a federal court has the power to exercise pendent or ancillary jurisdiction in a diversity case, it would be improper and inappropriate to exercise it. This was recognized by Judge Haynsworth in *Parker v. W. W. Moore & Sons, Inc.* (4th Cir., 1975), 528 F.2d 764, wherein the court stated:

> "From what we can gather from the pleadings, it appears quite likely that when the litigation comes to a conclusion it will clearly appear that the plaintiff's primary claim is against Moore [third-party defendant] and not against Inclinator [defendant] . . . From all that we can now foresee, however, the whole of plaintiff's claim may well prove to be entirely a state court claim. Under those circumstances, the state claim against Moore should not be swept into the diversity jurisdiction on the basis of a facial statement of a related claim against Inclinator, which alone would be triable in the federal court because of diversity of citizenship.
>
> "We . . . conclude that there is no ancillary federal jurisdiction of the plaintiff's claim against Moore." (528 F.2d at 766)

Thus, the collusive conduct on the part of Saalfrank and O'Daniel in impleading Parkview into the action, when O'Daniel in fact had no right of indemnification, for the sole purpose of allowing Saalfrank to assert a direct claim against this non-diverse third-party defendant should make it abundantly clear why this case is one especially inappropriate for the exercise of pendent or ancillary jurisdiction.

A third reason, equally important and interrelated with the prior one, concerns the impropriety of impleading Parkview as a third-party defendant.

The Court of Appeals held that O'Daniel had no right to be indemnified by Parkview (Pet. App., p. A30). This holding is not in dispute.

In essence, the Court of Appeals made this holding in light of the fact that neither O'Daniel nor her insurer, Nationwide, had made any payment to Saalfrank on behalf of Parkview (Pet. App., p. A5). Nor could O'Daniel or Nationwide be compelled to pay any monies in the future to Saalfrank in behalf of Parkview. The "Agreement Not To Execute" entered into by Saalfrank, O'Daniel and Nationwide completely shielded O'Daniel and Nationwide from any obligation or requirement to pay any additional sums (Pet. App., p. A30).

This holding is in complete accord with the law of the State of Ohio wherein no right to indemnify arises except upon payment of a judgment and expenses. *Maryland Casualty Co. v. Frederick Co.* (1944), 142 Ohio St. 605, 53 N.E.2d 795, 798-799. See also *Aetna Cas. & Sur. Co. v. Buckeye Union Casualty Co.* (1952), 157 Ohio St. 385, 105 N.E.2d 568; *O'Neill v. City of Cleveland* (1945), 145 Ohio St. 563, 62 N.E.2d 353; RESTATEMENT OF RESTITUTION, §§76-77, 80 and 96.

The importance of this holding is that it extinguishes the initial alleged link with which the District Court orignally asserted jurisdiction over Parkview, i.e., third-party complaint by O'Daniel for indemnification. No right for indemnification existed. Accordingly, the original basis for jurisdiction was non-existent.

This lack of an original jurisdictional basis under the non-existent right of indemnification evinces in a clear and unequivocal fashion just what Saalfrank was attempting. On the basis of a "facial statement" that O'Daniel had a right to be indemnified by Parkview, Parkview was impleaded as a third-party defendant. In fact, no

right to indemnification existed. In fact, the sole and ultimate purpose of the impleading was to allow Saalfrank, through the exercise of pendent or ancillary jurisdiction, to sue Parkview directly in the District Court.

The situation is no different than if Saalfrank had originally filed his suit naming O'Daniel and Parkview as defendants. This he could not do.

Respondent, Parkview, would respectfully submit that the aforedescribed circumstances of this particular case make it patently inappropriate to exercise pendent or ancillary jurisdiction, even assuming such power existed. The Petition for Writ of Certiorari should be denied.

The Court of Appeals' Holding in This Case Does Not Conflict With Any Decision of the Supreme Court of the United States.

It would appear that this Court has yet to pass upon the precise jurisdictional issue decided by the Court of Appeals herein. However, the recent decision of this Court in *Aldinger v. Howard* (1976), ... U.S. ....., 49 L. Ed. 2d 276, leaves little doubt as to the correctness of the Court of Appeals' decision in requiring a plaintiff, in a diversity action, to have an independent jurisdictional basis in order to file a direct claim against a third-party defendant. Especially so where the original basis for impleading the third-party is found to be non-existent.

In *Aldinger*, this Court held regarding the issue of pendent party jurisdiction with respect to 28 U.S.C. §1343 and 42 U.S.C. §1983, that if the party sought to be impleaded was not otherwise subject to federal jurisdiction, a federal court must satisfy itself not only that Article III of the United States Constitution permits the impleading, but also that Congress in its statutes conferring jurisdiction has not expressly or implicitly negated the jurisdiction.

Justice Rehnquist, in writing for the majority, made the following astute observation regarding the application of pendent or ancillary jurisdiction:

> "But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact'. . . . But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." (49 L. Ed. 2d at 286-287)

With the Court of Appeals' holding, which is not in dispute, that a right of indemnification in behalf of O'Daniel and against Parkview did not exist in light of the "Agreement Not To Execute" (Pet. App., p. A30), the net effect of what occurred in the District Court was that Saalfrank was permitted to directly sue a non-diverse *defendant* in a case whose jurisdictional basis was diversity of citizenship. Article III, §2, *supra*, expressly prohibits this.

Accordingly, although the *Aldinger* case does not speak to the precise factual setting of the instant situation, the necessary implication to be derived from *Aldinger* is that in the case at bar, Saalfrank must have an independent ground of jurisdiction before he can proceed directly against Parkview. No such jurisdictional basis exists.

Rule 54, Federal Rules of Civil Procedure, Does Not Authorize the Retroactive Extension of Jurisdiction Over a State Law Claim Upon Which Issues Have Neither Been Formed nor Tried.

At all times during the pendency of the lawsuit and conduct of the trial in the District Court and until nearly four (4) months after the trial, Parkview was a third-party defendant to an alleged claim of indemnification brought by O'Daniel. On two (2) prior occasions (once before and once after trial), Saalfrank had moved the District Court for authority to sue Parkview directly. On each occasion, the motion was denied on the ground that to do so would destroy subject matter jurisdiction.

Pursuant to the pre-trial conference prior to trial, while Parkview was still a third-party defendant, the right to jury trial was waived by it. This was done knowing that the District Court had already ruled that Saalfrank could not proceed directly against Parkview in the action.

As the Sixth Circuit observed:

> "Since Parkview was only in the case with respect to a third party complaint claiming indemnity, its counsel might properly have concluded that a jury trial would be of no particular benefit to it. The considerations on whether to reinstate the jury demand could certainly have been quite different if Parkview had known it would be required to defend Saalfrank's claim directly, with Ford and Kremer as well as O'Daniel as co-defendants and an insurance company as one of the plaintiffs. From the record it would be impossible to conclude that Parkview suffered no prejudice from the reversal of the district court's previous rulings." (Pet. App., p. A30)

Saalfrank argues in his Petition for Writ of Certiorari that the ruling of the Court of Appeals greatly restricts the usefulness of Rule 54(b) as a means of resolving cases with multiple issues and parties (Pet., p. 11). Yet, Saalfrank cites absolutely no authority to support his contention that Rule 54(b) was intended to be utilized as did the District Court. The reason for this is that no such authority exists.

Rule 54(b) was never intended to be used as attempted in this case. It was never intended to be used to the prejudice and detriment of a party such as occurred herein.

The Court of Appeals concluded that, based on the record before it, ". . . it would be impossible to conclude that Parkview suffered no prejudice from the reversal of the district court's previous rulings." (Pet. App., p. A30). A clearer statement that prejudice occurred to Parkview by the realignment of parties would be hard to imagine.

Saalfrank concedes that Rule 54(b) may not be applied so as to prejudice a party (Pet., p. 12). However, Saalfrank further argues that the Court of Appeals did not really say what it said (Pet., p. 12).

With respect to both the issue regarding the application of pendent or ancillary jurisdiction as well as the issue involving the Court of Appeals' interpretation of Rule 54(b), Federal Rules of Civil Procedure, Saalfrank has presented absolutely no questions or grounds which warrant the further attention of this Court.

The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS W. YODER
C. ERIK CHICKEDANTZ
LIVINGSTON, DILDINE, HAYNIE & YODER
425 Lincoln Bank Tower
Fort Wayne, Indiana 46802

JOHN M. CURPHEY
ROBISON, CURPHEY & O'CONNELL
425 Libbey-Owens-Ford Building
Toledo, Ohio 43624
Counsel for Respondent